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No. 90-1059

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

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SIMON & SCHUSTER, INC.,
*Petitioner,*
v.
MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether New York Executive Law § 632-a violates the First Amendment to the U.S. Constitution.

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## INTEREST OF THE *AMICI CURIAE*

*Amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

This case presents questions concerning the constitutionality of state legislation designed to ensure that criminals do not profit from their crimes before their victims have had an opportunity to satisfy civil judgments out of such profits. Among other things, this legislation eases the burden of victim compensation that would otherwise fall on the State's treasury. The great majority of States have comparable legislation. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

## STATEMENT

1. Over the past 25 years the State of New York has enacted a comprehensive statutory scheme to provide financial assistance to crime victims. *See* N.Y. Exec. Law §§ 630-635 (McKinney 1982 & Supp. 1990).[2] The initial legislation created a five-member Crime Victims Board ("Board") to make awards from state funds to crime victims for medical expenses, counseling needs, burial expenses, lost earnings and the loss of essential personal property incurred as a result of crime. *Id.* at §§ 626, 631.

In 1977, the Legislature added to the victim compensation scheme a provision for "Distribution of Moneys

[1] The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

[2] The New York Legislature defined the purpose of the statutory scheme as follows:

> The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

N.Y. Exec. Law § 620.



Received as a Result of the Commission of a Crime." *See* N.Y. Exec. Law § 632-a. The Legislature articulated the purpose of § 632-a as follows:

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.

Assembly Bill Memorandum Re: A9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823.

Section 632-a creates a mechanism for escrowing money owed to a person accused or convicted of a crime who sells a "reenactment" of the crime or an account of his or her "thoughts, feelings, opinions or emotions regarding such crime." N.Y. Exec. Law § 632-a(1).[3] The section also applies to any person who voluntarily and intelligently admits to the commission of a crime for which he or she is not prosecuted. *Id.* at § 632-a(10)(b). The money remains in escrow for five years, during which period the criminal may have immediate access to as much as twenty percent for "retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process." *Id.* at § 632-a(8). The Board may also permit payments from this twenty percent "for the necessary expenses of the production of the moneys paid into the escrow account." *Id.*

Crime victims may not make a claim directly upon the remaining funds that are held in escrow, but must instead first secure a civil judgment for damages against the criminal. *Id.* at § 632-a(1). The escrow fund, moreover, exists

[3] Where an escrow account is established for a person accused of a crime, the funds are immediately returned upon dismissal of the charges or acquittal. N.Y. Exec. Law § 632-a(3).

solely to satisfy claims for injuries suffered as the result of crime, not for injuries arising from any subsequent rendition of the crime. *Id.; see also id.* at § 621(3) (defining "Crime" for the purpose of establishing victim entitlement to escrow fund monies).

To guard against any abuse by the Board in the distribution of escrowed funds, the statute provides for judicial review of any determination with respect to such distributions. *Id.* at §632-a(12). The Board has also promulgated regulations providing for administrative and judicial review of its initial determination that certain contractual arrangements are covered by the statute. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 526.1 (1985).

2. On May 7, 1991, the New York Court of Appeals upheld the constitutionality of § 632-a. *Children of Bedford, Inc. v. Petromelis*, No. 77, slip op. (N.Y. May 7, 1991). In so doing, the court determined that the statute served five compelling governmental interests: the compensation of crime victims; the compensation of victims by their victimizers rather than by the State; the preservation of the victim's equitable right to assets earned by a criminal as a result of the victimization; society's fundamental belief that it is wrong for criminals to "salt their victims' wounds" by profiting from their victimization without recompense to the victims; and the equitable principle that criminals should not be permitted to profit from their wrongs. *See Children of Bedford*, slip op. at 13-16. The court rejected the contention that the statute was intended to protect the victim's or the public's "sensibilities" from offensive speech. *Id.* at 15 n.2. It held, moreover, that New York's tort and attachment laws are "unsuitable to protect the needs of crime victims." *Id.* at 18. It also held that the assets a criminal might earn by means other than recounting crimes fell outside the purposes of § 632-a, "which is intended to protect the victim's equitable claim to profits earned by a criminal from speech made possible by reason of their victimization." *Id.* at 19.



## SUMMARY OF ARGUMENT

Section 632-a does not restrict or prohibit a criminal's speech about crime or any other subject. Its constitutionality is to be evaluated according to the principles enunciated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and reaffirmed in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *City of Renton* sets forth the analytical framework for assessing the constitutionality of regulations that, while they accord differential treatment to certain speakers or speech, are enacted to achieve substantial governmental interests unrelated to the suppression of free expression.

Section 632-a satisfies each component of the *City of Renton* analysis. First, it is designed to serve New York's compelling interest in eliminating the injustice created when criminals profit from their crimes before the victims have had an opportunity to satisfy civil judgments against the criminals via a recovery from those profits.

Second, § 632-a does not foreclose any avenues of communication. The New York statute is fundamentally different from the Colorado criminal statute invalidated in *Meyer v. Grant*, 486 U.S. 414 (1986). The Colorado statute severely restricted political speech by prohibiting the speaker from spending money to circulate that speech. By contrast, § 632-a does not impose any limits on a criminal speaker's ability to circulate his message or on the media's ability to publicize that message. The financial limitations imposed by § 632-a on criminal speakers are comparable to the limitations upheld in *City of Renton, Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), *Buckley v. Valeo*, 424 U.S. 1 (1976), and other decisions involving economic disincentives to the exercise of free speech and other constitutional rights.

Finally, under the standards of *City of Renton* and *Ward*, § 632-a is "tailored" to serve the State's purposes.

Section 632-a is necessary because New York's tort and attachment law "address concerns wholly irrelevant to crime victims and the requirements for their use make them unsuitable to protect the needs of crime victims now covered" by the statute. *Children of Bedford*, slip op. at 18. Although the statute does not extend to nonexpressive assets of criminals or to expressive assets realized from non-crime related works, it is not underinclusive because those assets do not implicate the State's interest in eliminating the injustices to victims that the statute is designed to address. Nor is the statute overinclusive. It is no more inclusive than the zoning ordinance upheld in *City of Renton*, and its scope has been given a narrow reading by the New York courts.

## ARGUMENT

### SECTION 632-a IS CONSTITUTIONAL BECAUSE ITS JUSTIFICATION IS UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION, IT SERVES A SUBSTANTIAL GOVERNMENTAL INTEREST, AND IT DOES NOT FORECLOSE ANY AVENUES OF EXPRESSION

#### I. The Constitutionality Of Section 632-a Is To Be Determined According To The Principles Of *City Of Renton* And Its Progeny

##### A. *Under City* of Renton *A Regulation Of Speech Is Deemed Content Neutral If It Is Justified Without Reference To The Content Of The Regulated Speech*

Section 632-a does not prohibit the speech of anyone on any subject, and it does not prohibit payment to anyone for expression on any topic. Rather, it creates an escrow mechanism that delays for five years partial payment to perpetrators of crimes for speech based on those crimes, thereby providing crime victims with an opportunity to satisfy civil judgments redressing injuries suffered as a result of those crimes. Any net reduction in



the criminal's expressive profits derives from the criminal conduct, not from his speech. The statute imposes no financial charge on speech; it merely makes the proceeds of speech available to defray judgments against the criminal attributable to the criminal conduct that makes the speech possible.[4]

For these reasons, the analytical framework for determining the statute's constitutionality is provided by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and its progeny. *City of Renton* addressed the constitutionality of a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. 475 U.S. at 43. The Renton ordinance defined the targeted group of speakers solely by reference to the content of the "visual media" such speakers presented. *Id.* at 44.[5]

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[4] If the criminal conduct has no victims to press monetary claims, the proceeds of speech are not affected. *See Halmi v. New York State Crime Victims Board*, 12 Media L. Rep. (BNA) 2388 (Sup. Ct. N.Y. Co. 1986), N.Y.L.J. June 5, 1986, p. 12, col. 3, *aff'd on opn. below*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dept. 1987). If the crime's victims do not come forward within the statutory five-year period, the sums in the escrow fund are returned to the criminal. *See* Exec. Law § 632-a(4).

[5] The ordinance defined "adult motion picture theater" as any building " 'used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by any emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein.' " *Id.* at 44 (citation omitted).

There is no basis for declining to apply the *City of Renton* analysis here merely because *City of Renton* dealt with the regulation of sexually explicit speech. The First Amendment protects sexual expression as long as it is not obscene. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

The Court recognized that the Renton ordinance "treats theaters that specialize in adult films differently from other kinds of theaters." *Id.* It found, however, that the ordinance was not "aimed at the *content* of the films" but at "the *secondary effects* of . . . [adult] theaters on the surrounding community." *Id.* at 47. Renton's "predominate intent" was "unrelated to the suppression of free expression." [6] The ordinance was therefore "completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Id.* at 48 (citations omitted).[7]

The Court has subsequently reaffirmed that the *City of Renton* analysis is to be "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In *Ward*, a New York City ordinance regulating the use of sound amplifiers in a city-owned bandshell was found to be content-neutral because it was "'*justified* without reference to the content of the regulated speech.'" *Id.* at 791 (citations omitted). The *Ward* Court held that the test for a "content-neutral" regulation was

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[6] The City's "predominate intent" was, the Court found, articulated in the text of the ordinance:

> The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views.

*City of Renton*, 475 U.S. at 48 (citation omitted).

[7] The Court suggested that if Renton had intended to restrict "'the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'" *City of Renton*, 475 U.S. at 48, *quoting Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring).



> whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

*Id.* (citations omitted). Under the analytical framework of *City of Renton* and *Ward*, §632-a is content neutral.

### B. *Section 632-a Is Content Neutral Because It Is Justified Without Reference To The Content Of The Speech It Regulates And Its Justification Is Unrelated To The Suppression Of Free Expression*

Section 632-a does not prohibit any speech. Its "justification," moreover, is "unrelated to the suppression of free expression." *City of Renton*, 475 U.S. at 48; *see also Ward*, 491 U.S. at 791. The purposes of § 632-a are to "facilitat[e] compensation" to crime victims; to further "the State's interest in having criminals, rather than taxpayers, bear the burden of compensating their victims whenever possible"; and "to preserve the victim's equitable right to assets earned by a criminal as a result of the victimization." *Children of Bedford*, slip op. at 13-14. The statute is also "a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs." *Id.* at 15 (citing *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989)).

New York's regulation of payment for the affected speech is justified entirely without reference to the content of the speech. The statute was enacted to regulate the use of money made from the exploitation of crime through speech, rather than to regulate speech. Like the Renton ordinance, whose predominate concern was "the secondary effects of adult theaters," 475 U.S. at 47, the

predominate concern of Section 632-a is compensation of crime victims.

Simon & Schuster argues that the justification for the New York statute is impermissibly content-based because the statute was designed to protect crime victims from secondary psychological harm arising from speech. *See* Pet. Br. 24-25.[8] The New York Court of Appeals expressly rejected this argument. *See Children of Bedford*, slip op. at 15 n.2 ("The statute's purpose is to compensate crime victims not to protect their sensibilities."). Even if this concern had been a motivating factor in the enactment of § 632-a, however, the Legislature's *predominate* intention was not to suppress speech. *See Children of Bedford*, slip. op. at 13-14. Moreover, the existence of such "a motivating factor" would not justify invalidation of the statute. *See City of Renton*, 475 U.S. at 47-48, citing *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968).

## II. Section 632-a Is Constitutional Under The Analysis Prescribed By *City Of Renton*

*City of Renton* articulates a three-part inquiry. First, the statute must be "designed to serve a substantial governmental interest." *City of Renton*, 475 U.S. at 50 (cita-

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[8] Simon & Schuster relies solely on the statements of one legislator to establish the existence of the allegedly improper motivating factor for the enactment. Pet. Br. 24. As this Court has made clear, however,

> "[W]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

*City of Renton*, 475 U.S. at 48, quoting *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

Under the *City of Renton* analysis, if New York had actually wished to suppress speech it would (for example) have prohibited criminals from selling their stories to the media. *See City of Renton*, 475 U.S. at 48; *American Mini Theatres*, 427 U.S. at 82 n.4 (Powell, J., concurring).



tions omitted). Second, it must "allow for reasonable alternative avenues of communication." *Id.* Finally, it must be "narrowly tailored" to affect only the category of speakers that produces the undesirable secondary effects the regulation was designed to combat. *See id.* at 52 (citations omitted). Section 632-a satisfies each part of this inquiry.

### A. *Section 632-a Serves A Compelling Governmental Interest*

The court below correctly identified the compelling governmental interest at stake in this case:

> It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims are in need of compensation by reason of their victimization.

Pet. App. 13a (citations omitted). *See also Children of Bedford*, slip op. at 13-16. Simon & Schuster does not dispute the importance of this governmental interest. *See* Pet. Br. 28.

### B. *Section 632-a Does Not Foreclose Any Avenues Of Expression*

#### 1. *Section 632-a Does Not Impose Economic Burdens on the Circulation of Speech*

Because § 632-a prohibits no speech, a criminal speaker wishing to recount his or her crimes has an unfettered opportunity to do so. In petitioner's view, however, that opportunity is limited because the State regulates payment for the speech and, for purposes of constitutional analysis, speech and the payment for speech are indistinguishable. *See* Pet. Br. 13 ("[T]he right to make payments essential to *Wiseguy's* creation is constitutionally protected"). There is, however, no constitutional right to immediate payment for speech, and none of this

Court's decisions support petitioner's far-reaching claim of constitutional "right."

In support of its assertion, Simon & Schuster relies principally upon *Meyer v. Grant*, 486 U.S. 414 (1988). *Meyer* invalidated a Colorado criminal statute that prohibited the compensation of initiative or referendum petition circulators. The statute imposed a draconian limitation on political speech: its direct effect was to prevent a "speaker" (the sponsor of an initiative or referendum proposal) from publicizing his message by prohibiting him from paying people to circulate that message. Unlike the Colorado statute, § 632-a imposes no limitations, financial or otherwise, on the right of speakers or their publishers to circulate the criminal's ideas.[9]

The press tax cases on which Simon & Schuster relies are likewise inapposite. *See* Pet. Br. 21-22, *citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Both cases concerned state tax levies that imposed economic burdens on certain members of the press but not on non-press businesses or on other members of the press. Section 632-a, however, imposes no such burden on the press. Neither a publisher like Simon & Schuster, nor a writer like Nicholas Pileggi, nor a literary agency like Sterling Lord, is taxed or economically burdened by § 632-a.[10]

[9] Simon & Schuster's reliance on other decisions invalidating regulations prohibiting expenditures to circulate expressive messages is similarly unavailing. *See* Pet. Br. 18 n.15, *citing Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumberg v. Citizens For a Better Env't*, 444 U.S. 620 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). In each of these cases, the regulations at issue prevented certain speakers—in *Bellotti*, corporations; in *Riley*, *Munson* and *Schaumberg*, charities—from spending money to circulate their views under any circumstances.

Moreover, both *Meyer* and *Bellotti* involved political speech, the category of speech that "is at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776. *See also Meyer*, 486 U.S. at 421-22; *Buckley v. Valeo*, 424 U.S. at 14.



### 2. *Any Economic Disincentive To Speak Arguably Created by Section 632-a Is Constitutionally Permissible*

In Simon & Schuster's view, § 632-a is unconstitutional because it creates a disincentive for criminal speakers to sell their stories to the media. *See* Pet. Br. 19-20. As a result, the media will lose the opportunity to make profits from such stories, and the public will be deprived of those stories. *See id.* 18-21.

The basis for this argument is the unsupported assumption that § 632-a discourages criminals from cooperating with publishers. Simon & Schuster elevates this assumption to an article of faith, declaring that "the record shows without contradiction" that Henry Hill would not have cooperated in the production of *Wiseguy* without the timely and full payment of the monies due him under the Publishing Agreement. Pet. Br. 2-3. The record, however, shows no such thing. It is devoid of any statement by Hill or any other criminal speaker.[11] The trial

[10] The only reason that the Board imposed any financial burden on Simon & Schuster in this case is because the publisher failed to abide by the statutory requirements that it submit to the Board its contract with Hill, and all payments due Hill if Hill himself refused to comply with the Board's Order. *See* J.A. 54; Pet. App. 29a.

[11] The record contains affidavits of several publishing executives, author Nicholas Pileggi, and literary agent Sterling Lord speculating that criminals will not tell their stories because of § 632-a. J.A. 13-47.

In fact, several notorious criminal speakers, including David Berkowitz (the "Son of Sam" killer), Gary Gilmore, and Joan Harris, have based their decision to speak about their crimes on reasons other than the profit motive. *See* J.A. 111, 112 (Ber-

court correctly concluded that because of Simon & Schuster's failure to comply with the statute, "we will never know whether or not Hill would have cooperated." Pet. App. 36a. There is thus little or no evidence that § 632-a creates a disincentive to speech. Under similar circumstances—a case involving mixed evidence concerning an alleged threat to the marketplace of ideas—this Court declined to invalidate a limitation on an asserted First Amendment right. *See Branzburg v. Hayes*, 408 U.S. 665 (1972).[12]

The Court has repeatedly upheld regulations that create economic disincentives to speech and the exercise of other constitutionally protected rights. For example, the Court recently reaffirmed that regulation is not constitutionally suspect because it decreases the financial capacity to exercise or enjoy a constitutional right. In upholding a federal drug forfeiture statute against a Sixth Amendment challenge in *Caplin & Drysdale*, 491 U.S. 617, the Court directly addressed the argument that the forfeiture provision deprived the petitioner of assets necessary for the full enjoyment of his constitutionally pro-

kowitz); Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1364 n.74 (1988) (Gilmore); *Children of Bedford*, slip op. at 1 (Harris). *See Criminal Antiprofit Laws* at 1364-65 (statutes such as § 632-a do not create a disincentive to criminals' speech); Comment, *In Cold Type: Statutory Approaches to the Problem of the Offender as Author*, 71 J. Crim. L. & Criminology 255, 260 (1980) (same).

[12] In *Branzburg*, the press sought constitutional protection against compulsory grand jury testimony regarding its confidential sources on the ground that without such protection, confidential sources would not speak to the press and the public would thereby be deprived of important information. 408 U.S. at 693. There was no clear evidence in *Branzburg* concerning the claimed deterrent effect on sources. *Id.* Even accepting as fact the press' deterrence claim, however, the *Branzburg* Court concluded that any net loss in information available to the public could not overcome the state's substantial interest in the pursuit and prosecution of crime. *Id.* at 695.



tected right to counsel. In the Court's view that economic deprivation was not a constitutional defect:

> While petitioner and its supporting *amici* attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, there is no such distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right.

*Id.* at 628 (citations omitted).

Consistent with these principles, the Court has regularly upheld economic disincentives comparable to § 632-a. In *City of Renton* the Court found the zoning ordinance to be constitutional even though the effect of that ordinance was arguably to relegate adult theaters to a small portion of the city where there were no "commercially viable" adult theater sites. *See* 574 U.S. at 53. That economic disincentive to speak did not constitute a "substantial restriction" on speech for constitutional purposes. *See id.* at 54. In so holding, the Court reiterated that "'the inquiry for First Amendment purposes is not concerned with economic impact.'" *Id.* (citation omitted).[13]

[13] The Court has repeatedly upheld regulations that created economic disincentives for expression. *See, e.g., Rust v. Sullivan*, 59 U.S.L.W. 4451 (U.S. May 23, 1991) (upholding regulation conditioning federal funding for family planning services on limitation on speech concerning abortion); *Leathers v. Medlock*, 111 S.Ct. 1438 (1991) (upholding tax on cable TV operators that did not affect other members of the media); *Austin v. Michigan*

The Court reached a similar conclusion in the political speech context in *Buckley v. Valeo*, 424 U.S. 1, when it upheld the campaign contribution limitations imposed by the Federal Election Campaign Act of 1971 ("FECA"). The constitutionally permissible limitation on political contributions in *Buckley* is analogous to the limitation on payments to criminal speakers here. Like a contribution to a political candidate, which facilitates that candidate's ability to express his or her views, the payment by a publisher to a criminal speaker arguably facilitates the criminal's ability to speak.[14] Even in the core area of political

*Chamber of Commerce*, 110 S. Ct. 1391 (1990) (upholding state prohibition on corporate political expenditures); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) (upholding restriction on participation of charitable organizations in combined federal charity drive); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (upholding differential tax burden on charitable institutions based on the amount of lobbying they undertake); *FEC v. Right To Work Committee*, 459 U.S. 197 (1982) (upholding federal ban on soliciting political contributions from non-members); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (upholding cause of action for damages against the press for infringement of "right of publicity"); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (upholding Sunday blue law against "free exercise" challenge even though the regulation "as applied to appellants, operates to make the practice of their religious beliefs more expensive"); *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (upholding ban on door-to-door soliciting without invitation even though the regulation imposed an economic burden on solicitors); *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (upholding ban on sound trucks even though "more people may be more easily and cheaply reached by sound trucks").

[14] Simon & Schuster frequently cites *Buckley* in support of its challenge to § 632-a because *Buckley* invalidated FECA's limitation on independent expenditures in support of candidates. An independent expenditure for a political candidate, however, is not analogous to a publisher's payments to criminal speakers for the criminals' speech. A proper analogy to an independent political expenditure would be an expenditure by a publisher to promote the "message" of a criminal speaker or to promote the publisher's ideas concerning that criminal speaker. Section 632-a imposes no limits whatsoever on such expenditures. Its only limitation is on the amount a publisher can "contribute" to the criminal speaker for the criminal's speech.



speech, however, the Court decided that limits on such payments "entail[] only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20-21, and insufficiently restrict the speech of the recipient of the contribution (the candidate) to invalidate the limitation. *See id.* at 21.

In his concurring opinion in *Buckley* Justice White took this analysis a step further, highlighting the fact that FECA regulated the "giving and spending of money, acts that have First Amendment significance not because they are themselves communicative with respect to the qualifications of the candidate, but because money may be used to defray the expenses of speaking or otherwise communicating." *Id.* at 259. The very giving of money, however, was the circumstance that gave rise to the undesirable consequences that FECA was designed to correct, the purchase and sale of public office or the appearance thereof. *Id.* Because giving money is not in and of itself "speech," that conduct could be regulated; such regulation was not suspect because it prevented the accumulation of funds otherwise available for speech. *Id.* at 262.

Justice White's analysis is particularly pertinent here. New York and the forty other states with similar laws regulate the payment of money for criminal speech not because they regard that speech as undesirable, but because the *payment of money* to criminal speakers before their victims are compensated is an "undesirable consequence" the States seek to regulate. Like the contribution limitations upheld in *Buckley*, New York's regulation is not constitutionally infirm merely because it may diminish the amount of money realized by criminals for speech.

### C. *Section 632-a Is Narrowly Tailored To Serve The State's Compelling Purpose*

In requiring that a regulation of speech be narrowly tailored to fit its content-neutral purpose, the *City of Renton* Court limited the required "tailoring" analysis to a determination of whether the regulation was confined to the speakers that produced undesirable "secondary effects": "[T]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." 475 U.S at 52

In *Ward* the Court further particularized the tailoring requirement. It first reaffirmed that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." 491 U.S. at 794, citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949). Consequently, it rejected once and for all the notion that such regulation must be the least restrictive means of achieving the desired end:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least-restrictive or least intrusive means of doing so. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative.

*Ward*, 491 U.S. at 798-800. On the contrary,

> [T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial



> government interest that would be achieved less effectively absent the regulation.'

*Id.* at 799, *quoting United States v. Albertini*, 472 U.S. 675, 689 (1985).

Simon & Schuster asserts three "tailoring" objections to § 632-a, contending that it is simultaneously unnecessary, underinclusive and overinclusive. The tailoring analysis of *Ward* defeats each of these objections.

Although Simon & Schuster accepts the proposition that payments due criminals for expression may be attached to satisfy victims' claims, *see* Pet. Br. 30, it objects to the State's method of achieving that end on the ground that § 632-a is not "necessary." *Id.* at 28. This argument is simply a disagreement with New York's policymakers over how best to achieve a concededly valid end. The contention must be rejected on the basis of the express directive against such policy critiques in *Ward*. *See* 491 U.S. at 800.

At the same time, this contention is legally erroneous. According to Simon & Schuster, § 632-a is unnecessary because New York already has tort law, a prejudgment attachment statute and restitutionary and forfeiture provisions to deliver such funds to crime victims. Pet. Br. 28. However, the New York Court of Appeals has analyzed New York's tort and attachment law and has concluded that "[t]hese provisions address concerns wholly irrelvant to crime victims and the requirements for their use make them unsuitable to protect the needs of the crime victims now covered by Executive Law § 632-a." *Children of Bedford*, slip op. at 18. Simon & Schuster and its supporting *amici* themselves refute their own contention that § 632-a is unnecessary in light of New York's existing system for criminal restitution and forfeiture. As they correctly observe, "[n]either common law nor statutes have included payments for speech within the general definition of the fruits or proceeds of crime subject to restitution or forfeiture." Pet. Br. 34-35; *see also* Brief

*Amicus Curiae* of the American Civil Liberties Union at 19-32. Section 632-a is necessary because none of New York's alternative methods for reaching criminal assets are adequate for the purposes served by the statute.

Simon & Schuster's underinclusiveness and overinclusiveness arguments, *see* Pet. Br. 38-40, are also unpersuasive.[16] Simon & Schuster contends that the statute is underinclusive because it does not reach non-expressive assets of criminals or expressive assets from works on subjects not covered by the statute. Pet. Br. 31, 38-39. This argument fails because it misperceives the purpose of § 632-a. The statute was "intended to protect the victim's equitable claim to profits earned by a criminal from speech made possible by reason of their victimization." *Children of Bedford*, slip op. at 19. Profits a criminal may realize from consulting, from expressive works on topics other than the victimizing activity, or from inheritance or other after-acquired assets obviously do not implicate the State's interest in eliminating the injustice that the statute is designed to address. *See id.* at 18-19.[15]

Simon & Schuster contends that the statute is overinclusive because it applies to works that deal only in part with the statutory subjects. Pet. Br. 40. This argument is also meritless. The fact that § 632-a applies to works that discuss both crimes and subjects other than those covered by the statute does not distinguish it from the constitutionally valid ordinance in *City of Renton*, which applied to adult motion picture theaters even if such theaters also showed films that did not fit the statutory definition of "adult" material. *See* 475 U.S. at 44.[17]

[15] Simon & Schuster's underinclusiveness argument, and the similar position of the dissent below, are based in part on the assumption that a criminal's story is not typically the criminal's sole or even primary asset. Pet. Br. 31, 38-39; Pet. App. 21a. Scholarly studies belie that assumption. *See* R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility* 137 (1979) (ninety percent of convicted criminals have annual incomes of less than $5,000 at the time of arrest; over half are unemployed at the time of arrest); R. Meiners, *Victim Compensation* 3 (1978) (few apprehended criminals have the resources to pay the cost of the damages they have inflicted).

[16] Neither of these contentions addresses the focal point for "tailoring" analysis: whether "'the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799, *quoting Albertini*, 472 U.S. at 689. Section 632-a satisfies that requirement because it filled a gap in the existing statutory structure that made it substantially more difficult for victims to levy on criminals' profits.

[17] The suggestion of overinclusiveness is also refuted by the holding of the New York courts that the statute does not apply to works by criminals that make only incidental and *de minimis* reference to the crime. *See Application of Jean Harris v. Abate*, Index No. 89/24246 (Sup. Ct. 1990), N.Y.L.J., April 2, 1990, p. 25, col. 3.



## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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